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Recording Date - November 15, 2018

Recording Availability – November 21, 2018

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Thursday, November 15, 2018	12:00 PM to 1:15 PM	RCW 11.10 - Abatement of Assets

AGENDA

- 12:00 PM** Introduction
- 12:10 PM** Presentation: ‘RCW 11.10 - Abatement of Assets’, by Hans Juhl, Ryan, Swanson & Cleveland, PLLC
- 1:15 PM** Adjourn

SPEAKER BIOGRAPHY

Hans Juhl, Ryan, Swanson & Cleveland, PLLC – After attending college in Pullman and law school in Boston, Hans developed a general litigation practice in Oak Harbor, WA and served as President of the Island County Bar. After moving back to Seattle he worked for a boutique construction litigation firm in Seattle’s Capitol Hill neighborhood. Hans leveraged his general practice background and the skills learned in high stakes construction litigation to develop a practice which now focuses on trust and estate litigation, elder law, probate and contested guardianship while continuing to represent a select number of owners, contractors, and subcontractors in construction matters.

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RCW 11.10 Abatement of Assets. Discussion and basic application.

Presented by Hans P. Juhl

November 15, 2018



Ryan, Swanson & Cleveland, PLLC

RCW 11.10 Abatement of Assets

The abatement procedure applies when an estate is not of sufficient value to satisfy all bequests so that distributions must be reduced. This statute specifies how such distributions are to take place.

26B Wash. Prac., Probate Law and Practice § 5:33

RCW 11.10 Abatement of Assets

If there are insufficient assets to complete all bequests, the statutory abatement of gifts determines the priority in which gifts will be made.

26B Wash. Prac., Probate Law and Practice § 5:33

RCW 11.10 Abatement of Assets

All gifts are divided into four categories:

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

All gifts are divided into four categories:

a) Intestate property

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

All gifts are divided into four categories:

- a) Intestate property
- b) Residuary gifts

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

All gifts are divided into four categories:

- a) Intestate property
- b) Residuary gifts
- c) General gifts

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

All gifts are divided into four categories:

- a) Intestate property
- b) Residuary gifts
- c) General gifts
- d) Specific gifts

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

(1) A specific devise is a testamentary disposition of a specifically identified asset.

(2) A general devise is a testamentary disposition, usually of a specified amount of money or quantity of property, that is payable from the general assets of the estate.

Restatement (Third) of Property (Wills & Don. Trans.) § 5.1
(1999)

RCW 11.10 Abatement of Assets

“For purposes of abatement a **demonstrative gift**, defined as a general gift charged on any specific property or fund, is deemed a specific gift to the extent of the value of the property or fund on which it is charged, and a general gift to the extent of a failure or insufficiency of that property or fund.”

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

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RCW 11.10 Abatement of Assets

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RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

The reduction in gifts (abatement) then takes place within each classification, in proportional reduction.

26B Wash. Prac., Probate Law and Practice § 5:33

RCW 11.10 Abatement of Assets

Within each category, the same percentage reduction is applied to all heirs.

26B Wash. Prac., Probate Law and Practice § 5:33

RCW 11.10 Abatement of Assets

“Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.”

RCW 11.10.010(1)

RCW 11.10 Abatement of Assets

“If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (1)..., a gift abates as may be found necessary to give effect to the intention of the testator.”

RCW 11.10.010(2)

RCW 11.10 Abatement of Assets

“If the subject of a preferred gift is sold, diminished, or exhausted incident to administration, not including satisfaction of debts or liabilities..., abatement must be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.”

RCW 11.10.010(3)

RCW 11.10 Abatement of Assets

“To the extent that the whole of the community property is subject to abatement, the shares of the decedent and of the surviving spouse or surviving domestic partner in the community property abate equally.”

RCW 11.10.010(4)

RCW 11.10 Abatement of Assets

“If required under RCW 11.10.040, nonprobate assets must abate with those disposed of under the will and passing by intestacy.”

RCW 11.10.010(5)

RCW 11.10 Abatement of Assets

“If required under RCW 11.10.040, nonprobate assets must abate with those disposed of under the will and passing by intestacy.”

RCW 11.10.010(5)

RCW 11.10 Abatement of Assets

If a bequest is made from combined separate and community property, the bequest can only apply to the decedent's separate share of the property and decedent's community property share. The decedent cannot distribute the community property share of a spouse.

26B Wash. Prac., Probate Law and Practice § 5:34; RCW 11.10.020

RCW 11.10 Abatement of Assets

A community debt is charged equally to the community shares of the decedent and the surviving spouse. Next, a separate debt of the deceased is charged first to the decedent's separate property and then to the decedent's share of the community property. Expenses of administration are allocated in the same way.

26B Wash. Prac., Probate Law and Practice § 5:35; RCW 11.10.030

RCW 11.10 Abatement of Assets

Nonprobate Assets –

- a) Subcategorized within the classes of assets described in RCW 11.10.010, subject to the limitations in .020 and .030.

RCW 11.10.040

RCW 11.10 Abatement of Assets

Nonprobate Assets –

- a)** Subcategorized within the classes of assets described in RCW 11.10.010, subject to the limitations in .020 and .030.
- b)** “(4) If the nonprobate instrument of transfer or the decedent's will expresses a different order of abatement..., the nonprobate assets abate as may be found necessary to give effect to the intention of the decedent.

RCW 11.10.040

RCW 11.10 Abatement of Assets

Application of chapter.

This chapter applies in all instances in which no other abatement scheme is expressly provided

RCW 11.10.900

RCW 11.10 Abatement of Assets

Hypothetical Fact Pattern – *In Re Estate of Whiteacre.*

Denise Whiteacre is an unmarried, private practice litigator, who has accumulated moderate wealth. In March of 2005 Denise sees her estate planning attorney, after the sudden death of her eldest adult child. Her surviving adult children are Brian, a real estate developer, and Amy, an artist and chef.

RCW 11.10 Abatement of Assets

2005 - Denise reports to her estate planner that her income exceeds her expenses, that she has accumulated a healthy retirement account, has inherited her parents' shares in a closely held LLC, has paid off her house and plans to work ten more years before retiring to spend time with her grandchildren, including Emma and Finn who live with their mother, the widow of Denise's deceased child.

Denise's executes a will, prepared according to her wishes, that reflects her then current financial situation.

RCW 11.10 Abatement of Assets

2010 - Five years after executing her estate plan, Denise cashes in her retirement account to invest in a restaurant for Amy that would ultimately fail. Due to a personal lease guarantee, all of Denise's retirement account is surrendered to Amy's landlord. Amy then goes through a divorce and cannot find a job that will pay enough to support her own young children. Denise supports Amy with gifts of cash, until Amy can get back on her feet.

RCW 11.10 Abatement of Assets

2015 - Denise starts to suffer cognitive decline and can no longer practice law. She retires, collects social security, and draws down her cash and stock accounts to care for Amy and her children, and, later, for her own in-home care as she became progressively more affected by her Alzheimer's related dementia. She also takes out a HELOC to remodel her primary residence so that Amy and her children can move in, ostensibly to care for Denise. She continues to hope for the long promised liquidation of the Whitacres Family real estate holdings that will cause her inherited shares to convert to cash, but litigation regarding environmental contamination has made the real estate unmarketable and consumed the rental revenues.

RCW 11.10 Abatement of Assets

2017 - Brian, who is self supporting, accuses Amy of exploiting Denise, and he and Amy no longer speak, a cause of constant stress for Denise whose capacity continues to diminish.

RCW 11.10 Abatement of Assets

June 1, 2018. Seattle, Washington. Attorney, Denise Whiteacre has died of Alzheimer's following a lengthy period of decline. Denise, divorced since the early 80's, is survived by two children, Brian and Amy, and the two grandchildren of a predeceased child – Emma and Finn.

RCW 11.10 Abatement of Assets

Denise's date of death assets consist of:

1) Her primary residence	\$750,000
2) 50 shares in Whiteacre Family, LLC	\$500,000
3) Cash and equities	\$250,000
4) Vehicles and personal property	\$25,000
Total assets	\$1,525,000

RCW 11.10 Abatement of Assets

Denise's date of death liabilities consist of:

- | | |
|---|-------------|
| 1) HELOC on primary residence | (\$250,000) |
| 2) Uninsured medical/long term care bills | (\$100,000) |
| 3) Delinquent property taxes | (\$40,000) |

The probate attorney hired by Brian estimates that the administrative expenses will be (\$10,000).

Total debts and expenses	(\$400,000)
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RCW 11.10 Abatement of Assets

After her death, Brian as PR, admits Denise's 2005 will to probate. The will provides the following distribution scheme:

- 1) Specific bequest of primary residence to Amy ("free and clear").
- 2) Specific bequest of shares in Whiteacre Family, LLC to Brian.
- 3) Cash gifts of \$250,000 apiece, in trust, to Emma and Finn.
- 4) Residue to be divided, *per stirpes*, between her surviving heirs.

RCW 11.10 Abatement of Assets

Estate Accounting:

Primary residence	\$750,000	
50 shares of LLC	\$500,000	
Cash/Equities	\$250,000	
Personal property	\$25,000	
Administrative expenses		(\$10,000)
HELOC on primary residence		(\$250,000)
Medical/long term care bills		(\$100,000)
Delinquent property taxes		(\$40,000)
Total assets and liabilities		\$1,125,000

RCW 11.10 Abatement of Assets

The creditor's period has run and, other than the known liabilities, no claims are made. The tax returns are filed and the Estate appears to have plenty of assets. Brian needs to satisfy the Estate's liabilities and distribute the balance of the assets. Brian sees that he has \$1,125,000 in assets and believes that there is plenty of money.

How should Brian distribute the Estate?

RCW 11.10 Abatement of Assets

Step 1 – Does abatement apply?

The total value of the assets exceeds the liabilities. However, there is not sufficient value to “satisfy all bequests.” (26B Wash. Prac., Probate Law and Practice § 5:33)

The bulk of the estate’s value is in real property and unmarketable stock (\$1.25M).

The cash and personal property (\$275k) is insufficient to fund the debts and expenses (\$400k).

RCW 11.10 Abatement of Assets

Step 1 – Does abatement apply?

The bulk of the estate's value is in real property and unmarketable stock (\$1.25M).

The cash and personal property (\$275k) is insufficient to fund the debts and expenses (\$400k).

The estate is obligated to make cash bequests in trust to Emma and Finn in the amount of \$500k.

RCW 11.10 Abatement of Assets

Step 2 – Classify the gifts according to RCW 11.10.110

- a) Intestate property
- b) Residuary gifts
- c) General gifts
- d) Specific gifts

RCW 11.10 Abatement of Assets

Step 2 – Classify the gifts according to RCW 11.10.110

- 1) Primary residence to Amy – **Specific Gift**
- 2) Shares in Whiteacre Family, LLC to Brian – **Specific Gift**
- 3) \$250,000 apiece, in trust, to Emma and Finn – **General Gift** (What if the will directed that the gifts to Emma and Finn were to be made from Denise's IRA?)
- 4) Residue – **Residuary Gift**

RCW 11.10 Abatement of Assets

Step 3 – Determine Proportional Reduction

In order to pay the debts and expenses, and partially satisfy the gifts to Brian, Amy, Emma and Finn, what needs to happen?

RCW 11.10 Abatement of Assets

Step 3 – Determine Proportional Reduction

- 1) The personal property can be liquidated and added to the cash/stock, giving Brian \$275,000 to pay the debts and expenses. This leaves a cash deficit of \$125,000.
- 2) The intestate, residuary, and general gifts (Emma and Finn's) must abate, as there is not enough in the estate to pay those.
- 3) The aggregate value of the remaining gifts is \$1,250,000 (house (\$750k) and LLC shares (\$500k).
- 4) In order to partially satisfy all of the gifts which were not yet abated, they each need to be reduced to generate cash to make up the cash deficit.

RCW 11.10 Abatement of Assets

Step 3 – Determine Proportional Reduction

Per RCW 11.10.010(1), “abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.”

Amy is receiving $\$750,000/\$1,250,000 = 60\%$ of the remaining assets

Brian is receiving $\$500,000/\$1,250,000 = 40\%$ of the remaining assets

Amy must pay 60% of the remaining debts ($\$125,000 \times 0.6 = \$75,000$)
and Brian must pay 40% of the remaining debts
($\$125,000 \times 0.4 = \$50,000$), leaving them with:

Amy: \$675,000

Brian: \$450,000

RCW 11.10 Abatement of Assets

Step 3 – Determine Proportional Reduction

Value of remaining gifts: **\$1,250,000**

Available assets minus remaining debts:

Real property	\$750k
LLC shares	\$500k
Debts	\$125,000
TOTAL	\$1,125,000

Reduction proportion $1.125/1.25 = .9$

Amy will receive 90% of her original gift, or $(\$750k \times 0.9)$ \$675,000

Brian will receive 90% of his original gift, or $(\$500k \times 0.9)$ \$450,000